the United States Supreme Court, is but one of policy and as such a question for the legislature.[42]

D. J. W.

CRIMINAL LAW: THE INDETERMINATE SENTENCE.—A series of cases recently before the California courts, of which *Ex parte Bouchard*[1] and *Ex parte Lee*[2] are examples, have called the attention of the lawyer and the layman to the indeterminate sentence law[3] passed by the last legislature. The constitutionality of that measure has been definitely settled in Ex parte Lee, and its applicability to all those committing the designated crimes since July 27, 1917, has been established. The preliminary legal questions having been settled, it may be proper to devote a few words to the penological theories involved in the statute.

Punishment serves four purposes: as a reparation for the crime, as a means of reforming the criminal, as a deterrent to others, and as protection to society. Tarde[4] characterizes these purposes by the terms, "expiatory, exemplary, reformatory, and sanitary." Historically emphasis has been placed successively upon each of these ends of punishment, and as first one and then another was placed in the foreground, the kind and amount of punishment have changed accordingly.

Various criteria have been used in determining the kind and amount of punishment to be inflicted upon the wrongdoer. In the earliest times, the rank of the person injured fixed the penalty; later the crime itself was the standard; and finally the criminal was considered in meting out the penalty he must suffer for his infraction of the law. The first criterion has practically disappeared from civilized nations; the second and the third are those now used in determining the penalty for the crime.

The forms of punishment now in common use are death, imprisonment, and fine. At one extreme stands capital punishment. Reformation has no part here, and the nature of the crime alone fixes the penalty. The character of the man found guilty of first degree murder, save as bearing on the question of parole or commutation of sentence, has nothing to do with the punishment decreed. At the opposite extreme from capital punish-

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[42] As to the broad scope of the police power, and for unequivocal holdings that it is a matter which must be left to the legislative judgment where possible, see Munn v. Illinois, supra, n. 23; Atlantic Coast etc. R. R. v. Goldsboro (1914), 232 U. S. 548, 58 L. Ed. 721, 34 Sup. Ct. Rep. 364; Noble State Bank v. Haskell (1911), 219 U. S. 104, 55 L. Ed. 112, 31 Sup. Ct. Rep. 186; United R. R. v. San Francisco (1917), 239 Fed. 987; Erie R. R. Co. v. Williams (1914), 233 U. S. 685, 58 L. Ed. 1155, 34 Sup. Ct. Rep. 761.

[1] (Oct. 16, 1918), 27 Cal. App. Dec. 495.
[2] (Mar. 8, 1918), 55 Cal. Dec. 489.
[3] Cal. Pen. Code, § 1168; Cal. Stats. 1917, Chap. 527, p. 665.
[4] Penal Philosophy, G. Tarde, Chap. VIII, pp. 473-527.

ment stands the fine. Here is no thought of expiation. The aim of the fine is to be a deterrent. A man must keep his automobile within the speed ordinance or pay the price of its violation. In this class of offenses, the law usually leaves a wide margin between the maximum and minimum punishment, and the judge frequently takes into consideration the character, reputation and wealth of the person before him, as well as the nature of the offense, when assessing the fine. Lying between the extremes of death penalty and the fine is imprisonment. In this form of punishment are found all four purposes, while in the determination of its length both the crime and the criminal are factors. The usual statutory provisions for prison sentences are far too rigid. Long terms are imposed for reparation and as a deterrent, and to exclude the malefactor from society; short terms are imposed to give reformed prisoners their freedom. But today as formerly, prisoners are usually treated as a class, and sufficient allowance is not made either by statute or by the discretion of the magistrate for individuality of treatment.

Two parallel tendencies have been noticeable in penal reform,—in the purpose and in the "individualization of punishment."[5] From being regarded as retribution for crime and an example to evildoers, the end of punishment became reformation. Probation, suspended sentence, prison reform, education within prisons, and parole indicate this. The tendency today, however, is to regard the end of punishment neither as reparation nor as reformation, but as the protection of society. This view of the aim of punishment involves both the other purposes, for it requires that those who can be reformed shall be returned to society and those who can not shall be permanently excluded. Along with this development as to purpose has come the "individualization of punishment." The man, his character, his conduct, his environment, his education, such factors are entering more and more into the determination of the penalty. So today the purpose of our penal statutes might be summarized in the phrase: "Punishment to fit the criminal, and at the same time to offer the best protection to society."

The indeterminate sentence meets this two-fold requirement. The California statute provides that the judge shall not fix the term, but that the prisoner shall be released at some time between the maximum and minimum provided by law, that time to be decided by the board of prison directors; and in making this decision they shall consider the prisoner's "career, habits, degree of of education, age, nativity, nationality, parentage," etc. In this way the offender, after he serves his minimum, remains in prison only so long as he deserves. In the words of Wilbur J., in Ex parte Lee, "It is generally recognized by the courts and by modern penologists that the purpose of the indeterminate

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[5] The Individualization of Punishment, R. Saleilles.

sentence law, like other laws in relation to the administration of the criminal law, is to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing."

There is another side to the indeterminate sentence often overlooked both by its advocates and its opponents. It not only frees the man who deserves his freedom, but it continues to keep in prison the man who should not be permitted to return to society. The recidivist, or habitual offender, under a definite sentence, was set at liberty whether reformed or not at the expiration of his term. If given an indeterminate sentence the prison authorities could detain him until he served his maximum term or until they deemed him ready for discharge. Interesting figures come from Indiana where the indeterminate sentence plan has been in operation for more than twenty years.[6] Those figures indicate that it has resulted in lengthening the term of service in prison. The last three hundred men received in the Indiana prison under the old definite form of sentence served an average of one year, nine months, fourteen days. The first three hundred received under the indeterminate sentence served an average of three years, two months, twelve days. When it is noticed that the increase in the length of the average term under the new law is due largely to the longer terms served by men convicted of incest and rape, the figures have an added significance. For these crimes are peculiarly crimes resulting from psychopathic causes, and are therefore likely to be the acts of recidivists.[7]

The indeterminate sentence operates not only to save society from the recidivist, but, as Ferri[8] says, "The liberation of the condemned would take place with the certainty of his re-adaptation to the social environment." It serves at the same time to individualize punishment and to offer the best protection to society. As Mr. Brockway, the sponsor of the first indeterminate sentence law, passed in New York in 1877, phrases it: "The principle of the indeterminate sentence rests upon the opinion that all the legitimate objects to be gained by imprisonment of

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[6] XI American Statistical Association, p. 84.

[7] An interesting example is given by Aschaffenburg, Crime and its Repression, translated in Modern Criminal Science Series, 299, of a sexual offender who had been confined in prison eight times during fifteen years for the same sort of offense. The author predicted in his first edition that he would repeat the crime as soon as released. In his second edition, he is able to state that his prophecy has come true!

[8] Criminal Sociology, Ferri, p. 509.

offenders are included in the one purpose of public protection from crimes."[9]

Many advocates of the indeterminate sentence object to the form of the California statute, providing for a maximum and minimum term. They assert that to achieve its aim, the sentence must be without upper or lower limit. This may be theoretically correct; but the success of the plan will be determined by its practical operation. Prison guards and prison officials as a result of an imperfect administrative system in our state governments may not always be trusted to act independently and intelligently. This point of view was presented by a recent writer,[10] who declares the prisoners themselves are opposed to the indeterminate sentence because the length of their stay would depend too largely on the arbitrary will of not too capable prison officials. Until the system has passed the experimental stage it is perhaps better to place upon prison officials the check of the minimum and maximum limits of sentence. After the statute has been in operation for some time, and its results have been observed, it may be time to abolish artificial limits and carry the indeterminate sentence to its logical conclusion.

L. B. S.

EVIDENCE: JUDICIAL NOTICE OF MUNICIPAL ORDINANCES.—The case of *Marysville Woolen Mills v. Smith*[1] states the almost universal rule that courts of general jurisdiction, civil or criminal, will not take notice of the ordinances of a municipality, but that such ordinances must be pleaded and proved. The appellant in the principal case insisted that while no change was made in the method or mode provided by the state law of taxation, that by various ordinances of the city of Marysville changes with reference to the dates of assessments, delinqencies, sales and other matters provided for in the tax law as laid down in the Political Code in 1876 were made, including a change as to the date when the taxes should become delinquent, and that under said modifications the sale in question, made here on December 4, 1914, was authorized.

The court said, however, that "assuming that the city of Marysville had the authority to change the state law with reference to taxation to the extent contended for by appellant, the trouble in this case is that there is no evidence that this was in fact done." It was the duty of the appellant to show that the general law which governed upon the subject had been

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[9] 17 Charities, p. 866.

[10] 108 Atlantic Monthly, p. 330 (1911). The article was signed "A Prisoner."

[1] (Sept. 5, 1918) 56 Cal. Dec. 269, 272; Carpenter v. Shinners (1895) 108 Cal. 359, 41 Pac. 473; Chamberlayne's "Best on Evidence", p. 255.